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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1378

RUSSELL E. TRAIN, Administrator,
United States Environmental Protection Agency,
Petitioner,

v.

CAMPAIGN CLEAN WATER, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MEMORANDUM FOR RESPONDENT IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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Respondent Campaign Clean Water, Inc. ("Campaign Clean Water") hereby responds to the petition for a writ of certiorari filed by the Solicitor General on behalf of Russell E. Train, the Administrator of the United States Environmental Protection Agency ("the Administrator").

ALTERNATIVE STATEMENT OF QUESTIONS PRESENTED

1. Whether the district court and the court of appeals correctly held that, to the extent the Administrator's withholding of allotments has frustrated the purpose of the Federal Water Pollution Control Act Amendments of 1972, he has exceeded his lawful discretion and his action is subject to judicial review.

2. Whether the district court and the court of appeals correctly held that the doctrine of sovereign immunity does not operate to bar an action against an officer of the United States who is alleged to have exceeded his statutory authority in withholding allotments.

ALTERNATIVE STATEMENT OF THE CASE

On October 18, 1972, Congress enacted over the President's veto the Federal Water Pollution Control Act Amendments of 1972 ("the Act"),[1] an ambitious piece of legislation intended to eliminate discharges of pollutants into the nation's navigable waters by 1985.[2] The most crucial portion of the Act is Title II, which provides for federal grants to aid the construction of publicly owned sewage treatment works.[3] The funding process under this Title features two major stages: first, the *allotment* by the Administrator of contractual authority among the States on the basis of a legislatively prescribed

[1] 33 U.S.C. §§ 1251 *et seq.*

[2] *Id.* § 1251(a)(1).

[3] *Id.* §§ 1281 *et seq.*

formula; and, second, the later *obligational* stage, in which the Administrator, by approving construction plans submitted to him by governmental bodies, binds the federal government to fund seventy-five percent of the costs of any project so approved. This case involves the first of these two stages. Title II authorizes the Administrator to allot among the states $11 billion in contractual authority for fiscal years 1973 and 1974, but the Administrator announced on November 22, 1972, that at the direction of the President he was allotting only forty-five percent of that amount, or $5 billion.

This action was filed on January 15, 1973. Although the complaint alleged as alternative grounds that the Administrator either (a) had no discretion to withhold allotments, or (b) possessed limited discretion but had abused it,[4] Campaign Clean Water stated in its brief filed in support of its motion for summary judgment in the district court that it "does not contend that Congress intended to allow the Administrator *no* discretion to control expenditures under the Act."[5] Thus, it has been respondent's position in both the district court and the court of appeals that while the Administrator possesses some discretion to withhold allotments, his discretion is limited and has been abused.

The district court agreed with this position, declaring that the withholding of more than half of the funding authorized to be allotted among the states for fiscal years 1973 and 1974 was "a violation of the spirit, intent, and letter of the Act and a flagrant abuse of executive discretion."[6] On appeal, the

[4] Complaint ¶ 9.

[5] Memorandum of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment 17.

[6] App. 99A.

court of appeals agreed with much of the district court's ruling, holding that the courts may review the Administrator's withholding action to determine whether it frustrates the attainment of legislative goals and thus constitutes an abuse of discretion.[7] The court of appeals disagreed, however, with the district court's holding that an abuse of discretion was established by the record and remanded the case to the district court for further evidentiary proceedings.[8]

DISCUSSION

Campaign Clean Water believes that for several reasons this Court should grant the petitions for a writ of certiorari filed in this action and in the companion case of *Train v. City of New York*, No. 73-1377. First, judicial economy alone calls for a resolution by this Court of the questions presented in these two cases. Substantially identical issues are involved in a number of other actions pending in district courts or courts of appeals in the First, Fifth, Sixth, Seventh, Eighth, and District of Columbia Circuits.[9] It would be most inefficient to force the

[7] *Id.* at 46A-47A.

[8] *Id.* at 52A-53A.

[9] See the three cases cited in the petition for a writ of certiorari in *Train v. City of New York*, No. 73-377, at 6-7. See also *Maine v. Fri*, (D. Me. Civ. No. 14-51), *granting of T.R.O. aff'd* (lst Cir. No. 73-1254, Nov. 2, 1973) (pending before district court); *Ohio* ex rel. *Brown v. Administrator* (N.D. Ohio Civ. Nos. C 73 1061, filed Oct. 12, 1973, and C 74 104, filed Feb. 7, 1974) (cases consolidated); *Washington v. Train* (D.D.C. Civ. No. 74-105, filed Jan. 21, 1974); *Texas v. Train* (W.D. Tex. No. A-74 CA004, filed Jan. 14, 1974); *Florida v. Train* (N.D. Fla. Civ. No. 73-156, filed Sept. 6, 1973, motion for summary judgment granted February 25, 1974).

continued litigation of these questions in the lower courts when they could be finally resolved by this Court.[10]

Second, the questions presented by these two cases are important ones.[11] At issue are the extent of the discretion granted the Administrator to withhold allotments under a massive federal spending program, the power of the courts to review the exercise of any such discretion, and the extent to which the claimed immunity of the sovereign protects a governmental official who is alleged to have acted in excess of his authority. The first of these issues, especially, requires the interpretation of a complex statute and a legislative history characterized by the district court in this action as being "in the main unclear, politically charged, and . . . to some degree based on suspect constitutional interpretation of the powers of the President."[12] Already

[10] This is especially true when it is considered that, with substantially similar cases pending in district courts or courts of appeals in several circuits, it is not unlikely that conflicts between circuits may ultimately develop, thus prompting this Court to accept one or more of these cases for review at some time in the future. Given this likelihood, it makes a greal deal of sense to resolve these issues now.

[11] Respondent is aware that this Court declined to hear somewhat related issues in *Georgia v. Nixon*, 414 U.S. 810 (1973), a case in which respondent joined a number of states and other interested organizations in submitting an *amicus curiae* brief urging denial of Georgia's motion for leave to file a complaint. That case is readily distinguishable from these because, in addition to all the customary disadvantages of an original action, it involved a mutiplicity of programs and, if accepted, would almost surely have halted progress in more than thirty impoundment cases then pending in the lower courts.

[12] App. 96A.

$9 billion[13] in contractual authority has been withheld from the states on the basis of the Executive's questionable interpretation of this statute, and billions more are likely to be withheld in years to come. An authoritative construction of this statute by this Court is needed.

Finally, it is important that the pending petitions be granted in both of these cases and not only in one of them because Campaign Clean Water and the City of New York have differing views of the proper interpretation of the Act. The City argues that Congress intended to give the Administrator absolutely no discretion to withhhold allotments, while we concede some limited discretion at the allotment stage.

The difference between these two approaches is more than theoretical. Adopting the City's argument that no discretion exists at the allotment stage implies that, since Congress clearly intended to grant discretion to withhold funding at some stage, the Administrator may impound at the later obligational stage.[14] Thus, a victory on that ground might well be a pyrrhic one, with further litigation being necessary to pry loose funding at the obligational stage. If, on the other hand, our "abuse of discretion" argument prevails, the need for later litigation

[13] Although this action involves only the $6 billion, withheld from allotment for fiscal years 1973 and 1974, the Administrator announced in January 1974 the withholding of $3 billion of the $7 billion authorized by section 207 of the Act for fiscal year 1975, for a total of $9 billion withheld for the three fiscal years.

[14] Both the district court and the court of appeals in the *City of New York* case expressly withheld judgment regarding the extent of discretion at the obligational stage. See App. 31A n. 36, 76A.

would probably be obviated since a holding that Congress intended the Administrator to exercise his limited discretion at the allotment stage implicitly precludes him from taking a second bite from the apple at the obligational stage.[15]

In sum, this Court should grant the pending petitions in both of these cases so that it will have before it the full range of views concerning the proper interpretation of this important statute.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[15] See App. 100A